LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 26 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, [redacted] 1969

No. [redacted] 177

OLIVER ROSENBERG; STEPHEN H. TYNG, SR. and STEPHEN H. TYNG, JR.,

Petitioners,

v.

MARIE MINICHIELLO, as Executrix of the Estate of THOMAS MINICHIELLO, and MARIE MINICHIELLO; and ELWIN W. STEVENS, on behalf of his son, DENNIS J. STEVENS, an infant over fourteen years of age; and ELWIN W. STEVENS, individually,

Respondents.

BRIEF OF RESPONDENT ELWIN W. STEVENS (ON BEHALF OF HIS SON, DENNIS J. STEVENS, AND INDIVIDUALLY) IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

IRVING I. WAXMAN,
100 State Street,
Albany, N. Y. 12207,
Attorney for Respondent Elwin W. Stevens, on behalf of his son, Dennis J. Stevens, and Individually.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

PAGE

Argument 1

I. The constitutionality of New York's *Seider* doctrine was upheld by this Court in *Hanover Insurance Co. v. Victor*, 393 U. S. 7 1

II. The *Seider* doctrine is constitutional under either the debt attachment concept or the direct action concept 3

Conclusion. The Petition for a Writ of Certiorari Should be Denied 10

TABLE OF CITATIONS.

Cases:

Baskin v. Industrial Accident Commission, 338 U. S. 854 2

Fidelity & Deposit Co. of Maryland v. United States, 187 U. S. 315 2

Hanover Insurance Co. v. Victor, 393 U. S. 7, rehearing den. 393 U. S. 971 ..... 1, 2, 4

Harris v. Balk, 198 U. S. 215 ..... 3, 4, 6

North Coast Transportation Co. vs. United States, 323 U. S. 668 2

Ohio *ex rel.* Eaton v. Price, 360 U. S. 246 2

Pennington v. Fourth National Bank, 243 U. S. 269 6

Seider v. Roth, 17 N. Y. 2d 111 ..... 2, 3, 4, 5, 6, 7, 8, 10

Simpson v. Loehmann, 21 N. Y. 2d 305, rearg. den. 21 N. Y. 2d 990 ..... 2, 3, 4, 6

Victor v. Lyon Associates, Inc., 21 N. Y. 2d 695 ..... 2, 3

United States Statutes:

28 U. S. C. § 1404(a) 9

IN THE

Supreme Court of the United States

October Term, 1968

No. 1461

OLIVER ROSENBERG; STEPHEN H. TYNG, SR. and STEPHEN H. TYNG, JR.,

Petitioners,

v.

MARIE MINICHIELLO, as Executrix of the Estate of THOMAS MINICHIELLO, and MARIE MINICHIELLO; and ELWIN W. STEVENS, on behalf of his son, DENNIS J. STEVENS, an infant over fourteen years of age; and ELWIN W. STEVENS, individually,

Respondents.

BRIEF OF RESPONDENT ELWIN W. STEVENS (ON BEHALF OF HIS SON, DENNIS J. STEVENS, AND INDIVIDUALLY) IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

I

The constitutionality of New York's *Seider* Doctrine was upheld by this Court in *Hanover Insurance Co. v. Victor*, 393 U. S. 7.

The *Hanover* case was an appeal to this Court from a judgment of the New York Court of Appeals upholding the

constitutionality of New York's *Seider v. Roth* doctrine (decided by the Court of Appeals *sub nom Victor v. Lyon Associates, Inc.*, 21 N. Y. 2d 695; see also, *Seider v. Roth*, 17 N. Y. 2d 111). The New York Court of Appeals had decided the *Hanover* case simultaneously with *Simpson v. Loehmann* (21 N. Y. 2d 305, rearg. den., 21 N. Y. 2d 990) in a memorandum decision adopting, by reference, that Court's opinion in *Simpson*.

An examination of the papers and briefs submitted to this Court in the *Hanover* case shows that the appellant there made the identical arguments attacking the constitutionality of the *Seider* doctrine as the petitioners have advanced in the case at bar.

On October 14, 1968 this Court dismissed the *Hanover* appeal "for want of a substantial federal question." (*Hanover Insurance Co. v. Victor*, 393 U. S. 7).

It has long been recognized that this Court's dismissal of an appeal "for want of a substantial question" constitutes a decision on the merits that the State Court's disposition of the federal question was correct and that further argument of the matter would serve no useful purpose. (*Fidelity & Deposit Co. of Maryland v. United States*, 187 U. S. 315; *Baskin v. Industrial Accident Commission*, 338 U. S. 854; *North Coast Transportation Co. v. United States*, 323 U. S. 668; see also, the statement of Mr. Justice Brennan in his concurring opinion in *Ohio ex rel. Eaton v. Price*, 360 U. S. 246, at p. 247, that "votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case * * *.")

It is also noteworthy that following this Court's dismissal of the *Hanover* appeal, Hanover petitioned this Court for a rehearing in which it argued that a full review should be

granted on the ground that "the constitutional questions arising from the attachment in New York of liability insurers' duties in order to obtain jurisdiction over non-residents are novel and are the subject of many suits pending in New York and Federal courts, both trial and appellate." As an example, Hanover specifically referred to the instant *Minichiello* case which was then awaiting decision by the U. S. Court of Appeals for the Second Circuit. Rehearing was denied by this Court on November 25, 1968 (393 U. S. 971).

II

The *Seider* Doctrine is constitutional under either the debt attachment concept or the direct action concept.

In *Simpson v. Loehmann, supra* (and its companion case of *Victor v. Lyon Associates, Inc., supra*) the New York Court of Appeals sustained the constitutionality of the *Seider* doctrine on the ground that the insurance policy obligation was a debt to the defendant which was subject to attachment in New York, and that under the long-established principle of *Harris v. Balk,* 198 U. S. 215, there was no denial of due process to the defendant (see the majority opinion of Chief Judge Fuld, 21 N. Y. 2d 305, at p. 307). In doing so the New York Court approved of the jurisdictional procedure followed in *Seider,* in which a New York action had been brought against the insured with *quasi in rem* jurisdiction based upon the attachment of the insurance policy in New York and personal service on the insured outside the state. Judge Keating, however, in a separate opinion, concurred in the Court's decision that the *Seider* procedure was constitutional but based his conclusion on his view that even a direct action by the plaintiff

against the defendant's insurance company would have been constitutional (21 N. Y. 2d 305, at p. 312).

In the *Stevens* case at bar the U. S. District Court (Ryan, Ch. J.) sustained the constitutionality of the *Seider* procedure upon the debt attachment theory and quoted with approval from Chief Judge Fuld's opinion in *Simpson* (App. i). On appeal to the U. S. Court of Appeals the majority of the three judge panel which first heard this case affirmed, but placed their primary emphasis upon Judge Keating's approach that the effect of the *Seider* procedure was comparable to a direct action statute and held that since, in their opinion, a direct action statute would be constitutional, the *Seider* doctrine was also constitutional (App. 1a).

On the rehearing *in banc*, in which the Court of Appeals adhered to its original affirmance, the majority gave additional consideration to the attachment concept and held that *Seider* was also constitutional under that approach, citing *Harris v. Balk*, 198 U. S. 215 (App. 41a).

We contend that the constitutionality of the *Seider* doctrine can be sustained under either theory. The two opinions of Circuit Judge Friendly in the instant cases, the opinion of District Judge Ryan below in the *Stevens* case, the opinion of Chief Judge Desmond of the New York Court of Appeals in the *Seider* case, the opinions of Chief Judge Fuld and Judge Keating of the New York Court of Appeals in the *Simpson* case, that Court's *per curiam* opinion denying reargument in such case, and the brief submitted to this Court in the *Hanover* case by the Appellee there, in support of his motion to dismiss that appeal, all discuss these points cogently. Rather than burden this Court with a repetition of those arguments here, we respectfully refer

the Court to such opinions and brief and shall limit our present discussion to some additional observations.

In his dissenting opinions in the cases at bar Circuit Judge Anderson apparently felt that there was something inherently unfair about a *Seider* attachment of an insurance debt, as distinguished from attachment of other types of obligations. As can be seen from his hypothetical example in his original dissenting opinion, he was troubled by the prospect that under the *Seider* doctrine a resident of Alaska, as the accident state, who never resided elsewhere and who had never entered the State of New York or had any business there, could be subjected to the jurisdiction of New York and have to defend himself there. We submit, however, that the same situation could arise under other existing debt attachment laws which have long been held constitutional.

Suppose, for example, that same Alaskan had a bank account or investment account with the Alaska office of a bank, investment banker or stock brokerage firm which also maintained an office and engaged in business in New York. Obviously, the amount credited to the Alaskan's account would represent a debt owing to him by the bank or brokerage firm and would be subject to attachment in New York by the New York resident as the basis for *quasi in rem* jurisdiction to the extent of the debt. Here, too, the Alaskan who had never resided elsewhere, had never entered the State of New York or had any business there would be subjected to the jurisdiction of New York (to the extent of the attached debt) and have to defend himself there simply because his Alaskan debtor, over whom he had no control, happened to engage in business in New York.

If the reasoning of Judge Anderson's dissent is adopted by this Court it will mean that a debt could no longer comprise the *res* of an attachment outside the defendant's own state unless the defendant has additional contacts of his own with the other state, notwithstanding the fact that the debtor and the obligation sought to be attached are concededly amenable to the other state's legal process and jurisdiction. We submit that such a result would be in direct conflict with this Court's decisions in *Harris v. Balk, supra* and *Pennington v. Fourth National Bank,* 243 U. S. 269, holding that a debt may be attached, and *quasi in rem* jurisdiction founded thereon, in any state where the debtor is amenable to personal service of process. We further submit that the *Seider* doctrine stands on exactly the same legal footing.

Petitioners' position is that a person who ventures outside the borders of his home state does so at his own risk. They argue that if he is injured in another state, even if entirely the fault of another driver, his suit must be brought in the defendant's home state, regardless of all other considerations. We submit that such approach is narrow and provincial and ignores our present day mobile society and the realities of automobile negligence litigation. In rejecting the same argument in the *Seider* and *Simpson* cases the New York Court of Appeals recognized that the law must be construed in a contemporary and pragmatic fashion to achieve justice and protect the rights of all of the parties. The New York Court achieved that objective in *Seider* by preserving traditional concepts of jurisdiction, but updating them to meet current considerations. The awareness of the courts of the need to adapt legal concepts to meet contemporary problems and of the dangers of rigid

adherence to doctrinaire principles is the lifeblood of the law's growth.

The *Seider* doctrine achieves justice by balancing the rights and obligations of both parties, rather than weighting the scale in favor of the defendant, which would be the result in the cases at bar without *Seider*. The petitioners contend that *Seider* is unfair to a defendant because it permits him to be sued in another state to the extent of his insurance coverage. But such a defendant does not stand alone or helpless in that other state for his insurance company is there ready and able to provide him with all the services and indemnity called for by his policy, to the same extent as though the action had been brought in his home state. His company, through its local office in the venue state, will retain and pay for expert local counsel, cause a thorough investigation to be made wherever necessary using the facilities of its nationwide network of offices, and, in a proper case, attempt to negotiate a settlement with the plaintiff and his attorney. If the case proceeds to trial the company will make the necessary arrangements for the appearances of witnesses and the conduct of the trial. These are services which the company agreed to furnish to the defendant under the terms of the policy requiring it to defend in any place where jurisdiction is obtained against its insured. The company is not doing so gratuitously. This is its business and the defendant, by his insurance premiums, has paid the company to do so. In other words, so far as the conduct of the litigation is concerned, neither party has any practical advantage over the other.

On the other hand, without *Seider*, a plaintiff injured in another state is placed at a serious disadvantage in pursuing his rights. Regardless of how flagrant the culpability

of the local defendant may be (*e. g.*, a drunk driver running down a non-resident pedestrian on the sidewalk) the plaintiff would be compelled to litigate in the defendant's home state. Unlike the defendant, he does not automatically have someone to turn to away from his home state, with full facilities to handle the matter and the related expenses from beginning to end. He must seek out a stranger as his attorney to handle the matter with a distant office of the defendant's insurance company even though that same company has another office in the plaintiff's home state, or even his home city, to which the matter could just as easily have been referred.

It needs no elaboration to point out that in the real world of negligence litigation the insurance companies are not unmindful of the practical problems confronting a plaintiff in litigating a matter in a foreign jurisdiction and of the advantage this gives the company in effecting settlement terms much more favorable to it than would otherwise be the case if the plaintiff were evenly matched with the defendant's insurance company in a jurisdiction where both the plaintiff resided and the insurance company conducted its business.

It is important to bear in mind that even under the *Seider* doctrine the courts always have the right to transfer venue from the plaintiff's jurisdiction to that of the defendant on the ground of *forum non conveniens* where the circumstances of the case warrant it. A procedural pattern for *Seider* type cases has already been taking form. In a typical case the plaintiff brings his action in the state court based on his attachment of the insurance policy. The non-resident defendant, through a New York branch of his insurance company, removes the case to federal district court on diversity grounds and then moves for a change of

venue to the federal district court of the defendant's state. If, as Judge Anderson suggested in his dissent below, there might be persuasive venue considerations in a given case, such as availability of witnesses or police and medical records, affording the jury an opportunity to view the accident scene, the ease of ascertaining the governing law, etc., the district court need only grant the motion for a change of venue. But the fact that in some cases a change of venue to the defendant's jurisdiction might serve the ends of justice is not justification for adopting a blanket rule that the place where the accident occurred will always be the most appropriate place of venue. We need look no further than the *Stevens* case at bar for a case directly in point.

The plaintiffs in the *Stevens* case are residents of New York, residing near Troy. The defendants, Tyng, are residents of Massachusetts, residing on Cape Cod, and the accident occurred on Cape Cod. After removing the plaintiffs' New York action to the U. S. District Court for the Northern District of New York the defendants (through their New York attorneys employed by their insurance company pursuant to the policy obligation) moved for a transfer of venue to the U. S. District Court for Massachusetts, for the convenience of the parties and witnesses pursuant to 28 U. S. C. § 1404(a). The defendants' motion was denied by Chief Judge Sylvester J. Ryan of the Southern District of New York (to whom the case had been referred) on the ground that "the principal factual issue for trial is the extent of plaintiff Dennis J. Stevens' injuries. The important witnesses on this would be the doctors who operated upon and treated Stevens, and indeed, Stevens himself; they all reside in New York. * * * Defendants have

entirely failed to establish that a transfer should be ordered" (see App. v).

We respectfully submit that the *Seider* doctrine rests on a sound constitutional basis whether considered in the traditional concept of the attachment of a debt or by analogy to a direct action statute, and that such doctrine does no more than recognize the realities of our contemporary mobile society and the practical impact of universal automobile liability insurance coverage on the enforcement of negligence claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

IRVING I. WAXMAN,
100 State Street,
Albany, N. Y. 12207,
Attorney for Respondent Elwin W. Stevens, on behalf of his son, Dennis J. Stevens, and Individually.